

ALBERT L. GRAY, Administrator, <i>et al.</i> , Plaintiffs,)	C.A. No. 04-312L
)	
v.)	
)	
JEFFREY DERDERIAN, <i>et al.</i> , Defendants.)	
)	
<hr/>		
)	
ESTATE OF JUDE B. HENAULT, <i>et al.</i> , Plaintiffs,)	C.A. No. 03-483L
)	
v.)	
)	
AMERICAN FOAM CORPORATION, <i>et al.</i> ,)	
)	
Defendants.)	
)	

The allegations and claims in Gray, et al. v. Derderian, et al., C.A. No. 04-312L, that are the subject of this motion appear at paragraphs 396-410 (Count 28) of the First Amended Master Complaint in that action.

Those same allegations and claims also have been adopted by the Plaintiffs in the following actions:

- C. A. No. 03-148L (Passa);
- C. A. No. 03-208L (Kingsley); and
- C. A. No. 05-02L (Paskowski).

Accordingly, the Clear Channel Defendants hereby move to dismiss those actions as well.

The allegations and claims in Estate of Jude Henault, al v. American Foam Corporation, et al., C.A. No. 03-148L, that are the subject of this motion are set forth at paragraphs 396-410 (Count 28) of the First Amended Master Complaint, as adopted pursuant to the “Notice of Adoption of First Amended Master Complaint (Station Nightclub Fire Litigation)” (hereinafter “Notice of Adoption”) filed in that action on or about December 14, 2004. Additionally, this motion is directed to paragraphs 66-71 (Additional Count 10), as set forth in the aforementioned Notice of Adoption.

Those same allegations and claims also have been adopted by the Plaintiffs in the following actions:

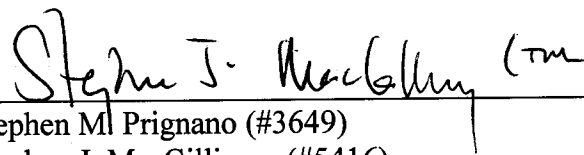
- C. A. No. 03-335L (Guindon);
- C. A. No. 04-26L (Roderiques); and
- C. A. No. 04-56L (Sweet).

Accordingly, the Clear Channel Defendants hereby move to dismiss those actions as well.

In support hereof, the Movants incorporate by reference the Omnibus Memorandum of Capstar Radio Operating Company and Clear Channel Broadcasting, Inc. in Support of Their Motions to Dismiss, which is filed on the same date hereof.

Capstar Radio Operating Company and
Clear Channel Broadcasting, Inc.

By their Attorneys,

A handwritten signature in black ink, appearing to read "Stephen M. Prignano", is written over a horizontal line. To the right of the signature, the letters "(TM)" are handwritten.

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Dated: February 4, 2005

CERTIFICATION

I, the undersigned, hereby certify that on the 4th day of February, 2005, I served a copy of the within MOTIONS OF CAPSTAR RADIO OPERATING COMPANY AND CLEAR CHANNEL BROADCASTING, INC. TO DISMISS, by electronic mail, to the following counsel of record:

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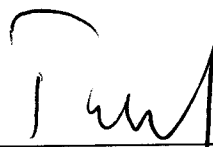
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

ALBERT L. GRAY, Administrator, *et al.*,
Plaintiffs,

v.

JEFFREY DERDERIAN, *et al.*,
Defendants.

C.A. No. 04-312L

ESTATE OF JUDE B. HENAULT, *et al.*,
Plaintiffs,

v.

AMERICAN FOAM CORPORATION,
et al.,
Defendants.

C.A. No. 03-483L

**OMNIBUS MEMORANDUM OF CAPSTAR RADIO OPERATING
COMPANY AND CLEAR CHANNEL BROADCASTING, INC.
IN SUPPORT OF THEIR MOTIONS TO DISMISS**

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W. Page Keeton, *et al.*, Prosser & Keeton on the Law of Torts (5th ed. 1984).....22, 24

Capstar Radio Operating Company¹ and Clear Channel Broadcasting, Inc. (collectively the “Clear Channel Defendants”) are named as defendants in the above-captioned actions, which arise out of the tragic events that transpired on February 20, 2003 during a concert featuring the band Great White at The Station nightclub. Shortly after 11:00 p.m. on that evening, Great White’s pyrotechnic devices ignited flammable soundproofing on the walls and ceiling of the performance area, resulting in a fire that rapidly swept through the nightclub, killing 100 people and injuring over 180 others. Plaintiffs are those allegedly injured in that fire and the representatives of those killed.

A tragedy of this magnitude predictably and commendably triggers wide-ranging efforts to determine cause and to assign responsibility. Just as predictably, but less commendably, some of those efforts strive to blame people or entities with absolutely no causal link to the tragedy, but who are perceived as having economic resources that might be captured to compensate the victims.

So it is here with the Clear Channel Defendants. As will be shown in this Omnibus Memorandum, the Amended Master Complaint² and the Henault Notice of Adoption³

¹ Through a series of mergers, Capstar Radio Operating Company is the successor-in-interest to WHJY, Inc., a Rhode Island corporation that operated radio station WHJY-FM. Capstar Radio Operating Company is a wholly-owned subsidiary of Clear Channel Broadcasting, Inc.

² Throughout this Omnibus Memorandum, “Amended Master Complaint” shall refer to the First Amended Master Complaint filed in Gray, et al. v. Derderian, et al., C.A. No. 04-312-L, and which has been adopted by the Plaintiffs in Passa, et al. v. Derderian, et al., C.A. 03-148L, Kingsley v. Derderian, et al., C.A. 03-208L, and Paskowski, et al. v. Derderian, et al., C.A. No. 05-002L.

³ Throughout this Omnibus Memorandum, “Henault Notice of Adoption” shall refer to the Notice of Adoption of First Amended Master Complaint, filed in Estate of Henault, et al. v. American Foam Corp., et al., C.A. No. 03-483L (Dec. 14, 2004), which has been adopted by the Plaintiffs in Guindon, et al. v. American Foam Corp., et al., C.A. No. 03-

fail to set forth factual allegations from which a court could conclude that the Clear Channel Defendants had any legal duty -- or even any right -- to control anything causally connected to the fire. Instead, these pleadings allege in conclusory fashion that the Clear Channel Defendants “sponsored” or “promoted” the event, “should have known” certain alleged facts about the event, or were engaged in a “joint venture” with other defendants -- concepts that in reality are not factual averments, but rather legal conclusions.

Under Rule 12(b)(6), this Court can push past the conclusory generalities in these Complaints and determine whether Plaintiffs⁴ allege “a *factual* predicate concrete enough to warrant further proceedings” against the Clear Channel Defendants. See DM Research, Inc. v. College of Am. Pathologists, 170 F.3d 53, 55 (1st Cir. 1999) (emphasis in original). Dismissal of the Plaintiffs’ claims is appropriate here because those claims fail to present any meaningful, fact specific allegation that establishes that the Clear Channel Defendants owed any legal duty to the Plaintiffs, or should bear liability for the Plaintiffs’ injuries. See Berner v. Delahanty, 129 F.3d 20, 25 (1st Cir. 1997).

Continued from previous page

335L, Roderiques v. American Foam Corp., et al., C.A. No. 04-026L, and Sweet, et al. v. American Foam Corp., et al., C.A. No. 04-056L.

⁴ As used in this Omnibus Memorandum, the term “Plaintiffs” (unless otherwise noted) shall mean all plaintiffs who have asserted claims against the Clear Channel Defendants through adoption of the Amended Master Complaint, either directly or via the Henault Notice of Adoption. The term “Henault Plaintiffs” shall mean those plaintiffs who have adopted the additional joint venture allegations set forth in the Henault Notice of Adoption.

I. THE PLAINTIFFS' ALLEGATIONS

The 153-page Amended Master Complaint concentrates all of its substantive allegations against the Clear Channel Defendants⁵ in seven paragraphs, numbered 396 through 402:

396. Defendant WHJY was in early 2003 a radio station that broadcast, among other types of music, heavy metal rock music. The defendant was sufficiently familiar with the band known as Great White to be aware of the style and manner of its musical performance and stage production. Specifically, WHJY, Inc., through its agents, servants and employees had or should have had specific knowledge that the band Great White used pyrotechnics before proximate audiences at its concerts.

397. By early January 2003, defendant WHJY, Inc. had determined that it would promote, sponsor and endorse a concert by the heavy metal band Great White at The Station in West Warwick, Rhode Island on February 20, 2003. WHJY, Inc. agreed to accomplish this by:

- a. advertising its promotion and sponsorship in print and on the radio;
- b. authorizing a banner which announced the concert and expressly invited patrons to "party with WHJY" and hanging it outside the concert venue days prior to February 20, 2003;
- c. distributing free tickets to the concert through its radio station;
- d. providing its employee Mike Gonsalves to be master of ceremonies and to introduce the band Great White, as well as providing various interns to assist at The Station during the concert with promotion and sponsorship;
- e. meeting with others who were promoting the concert, including club owners and operators, and employees of defendants Anheuser-Busch and McLaughlin & Moran, Inc., and coordinating the timing of these promotional activities prior to and during the concert of February 20, 2003.

⁵ Plaintiffs also assert that Capstar Radio Operating Company, as successor in interest to WHJY, Inc., and Clear Channel Broadcasting, Inc., as owner of Capstar and as the principal in control of the day-to-day affairs of radio station WHJY-FM, should bear liability for the Plaintiffs' injuries, based on the substantive allegations reviewed above. See Amended Master Complaint, ¶¶ 404-10.

398. Defendant WHJY, Inc. by its employee and agent, Mike Gonsalves, had both the authority and opportunity to stop or delay Great White's performance over any issue relating to safety or equipment.

399. WHJY, Inc. knew or should have known that the concert and band that it promoted was one that customarily utilized pyrotechnics and that Great White had repeatedly, openly and illegally used unlicensed pyrotechnics on its tour on numerous occasions prior to February 20, 2003. Minimal inquiry by WHJY, Inc. would have disclosed the inherently dangerous nature of the band's performance, a performance that WHJY knew or should have known would begin with the setting off of illegal pyrotechnics before a proximate audience.

400. By virtue of these special circumstances, WHJY, Inc. owed a duty as the promoter and sponsor of the concert Great White was to perform in West Warwick at The Station on February 20, 2003, to make minimal inquiry sufficient to discover the dangers of the band's performance. Additionally, WHJY, Inc.'s allowing the use of the trademark or servicemark, "WHJY" without making such minimal inquiry into the quality or safety of the product or services associated with it constituted naked licensing of the mark which deceived, or tended to deceive, the public, including Plaintiffs.

401. WHJY, Inc.'s duty derived from its special role in supporting and promoting the concert and from its superior knowledge of the likelihood and probability that Great White would utilize proximate pyrotechnics in an illegal fashion in a proximate setting such as that at The Station.

402. WHJY, Inc. breached its duty to patrons of the Great White concert at The Station in West Warwick on February 20, 2003, and their [sic] negligence caused deaths and severe personal injuries to plaintiffs.

In addition to the foregoing allegations, the Henault Plaintiffs also have asserted that the Clear Channel Defendants were engaged in a "joint venture" with several other defendants, with the common purpose of "planning, endorsing, sponsoring, promoting, and/or advertising" the Great White concert.⁶ These Plaintiffs go on to allege that the joint venture defendants collectively breached a legal duty owed to the Plaintiffs through "negligent, careless

⁶ See Henault Notice of Adoption, ¶ 67.

and/or reckless acts or omissions in planning, endorsing, sponsoring, promoting and/or advertising the Great White concert”⁷

Neither the Amended Master Complaint nor the Henault Notice of Adoption state claims upon which relief can be granted against the Clear Channel Defendants. In alleging, for example, that the Clear Channel Defendants should be held liable on the basis of “advertising” or “meeting with others” to discuss promotional issues, the Plaintiffs run afoul of the Constitution of the United States. Because the Plaintiffs do not (and cannot) allege that these speech-based activities incited anyone to immediately harmful conduct, the First Amendment renders those theories untenable. See pp. 9-11, infra.

Another contention that runs through the Plaintiffs’ claims is that, as a “sponsor” or “promoter” of the Great White concert, the Clear Channel Defendants owed a legal duty to the Plaintiffs, and the breach of that duty caused the Plaintiffs’ injuries. But the Amended Master Complaint does not (and cannot) allege that the Clear Channel Defendants had any control over, or the right to control, any instrumentality that caused the fire. Without control over such a causative factor, a sponsor or promoter owes no legal duty, and has no liability, to persons injured at an event like the Great White concert. See pp. 11-21, infra.

Plaintiffs’ allegations of the Clear Channel Defendants’ supposed “knowledge” of Great White’s performance style, or of the band’s plans for the February 20, 2003 performance, also fail as a matter of law. Standing alone, knowledge of a dangerous condition, like foreseeability of harm, does not impose a legal duty on a defendant. See pp. 21-23, infra. Furthermore, the “special circumstances” and “special role” mentioned by the Plaintiffs are

⁷ See id. ¶ 70.

simply empty, conclusory terms that lack any factual predicates in the Amended Master Complaint. See pp. 23-25, infra. Plaintiffs' attempt to impose a duty to "make minimal inquiry" on the Clear Channel Defendants lacks any basis in law, and cannot support an actionable claim. See 23-25, infra. And, public policy concerns, which are integral to a duty analysis, militate against imposing a legal obligation (or liability) on a broadcaster who sponsors or advertises an event, especially where, as here, the sponsor has no control of the event. See pp. 27-28, infra.

Plaintiffs' final theories of liability are similarly groundless. Their invocation of the term "naked licensing," which is a defense to trademark infringement claims, lacks any legal import in the sponsorship liability context. See p. 29, infra. The "joint venture" theory advanced by the Henault Plaintiffs also fails as a matter of law because those Plaintiffs do not (and cannot) allege that the Clear Channel Defendants had equal authority with the other alleged joint venturers to control the means of executing the supposed joint purpose. This claim also is deficient because the Henault Plaintiffs fail to allege (and cannot allege) other elements of a "joint venture" claim under Rhode Island law. See pp. 30-34, infra.

This Omnibus Memorandum first will examine the scope of this Court's review of the Plaintiffs' claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. It then will describe the legal insufficiency of the theories of liability advanced against the Clear Channel Defendants in the Amended Master Complaint and the Henault Notice of Adoption. In doing so, this Omnibus Memorandum will demonstrate that the Plaintiffs' pleadings should be dismissed under Rule 12(b)(6), because none of them state a claim against any of the Clear Channel Defendants upon which relief can be granted.

II. THE MOTIONS TO DISMISS SHOULD BE GRANTED BECAUSE THE PLAINTIFFS DO NOT ALLEGE ANY LEGAL OR FACTUAL BASES FOR IMPOSING A LEGAL DUTY ON THE CLEAR CHANNEL DEFENDANTS.

In considering a Rule 12(b)(6) motion, a court must accept all factual allegations in the complaint as true, and must view them in the light most favorable to the plaintiff. See, e.g., Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969). Nevertheless, courts are not obligated to accept as true “[b]ald assertions, subjective characterizations and legal conclusions.” DM Research, Inc. v. College of Am. Pathologists, 2 F. Supp. 2d 226, 228 (D.R.I. 1998), aff’d, 170 F.3d 53 (1st Cir. 1999); see also Berner v. Delahanty, 129 F.3d 20, 25 (1st Cir. 1997) (“ ‘periphrastic circumlocutions, unsubstantiated conclusions, [and] outright vituperation’ carry no weight” under Rule 12(b)(6)). The factual allegations instead must be specific enough to justify “drag[ging] a defendant past the pleading threshold.” Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 (1st Cir. 1988).

In elaborating upon the concept of a “pleading threshold,” the First Circuit has cautioned that:

[T]he price of entry, even to discovery, is for the plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition.

DM Research, Inc., 170 F.3d at 55 (emphasis in original).

In DM Research, the plaintiff sued two defendants for an antitrust conspiracy. The plaintiff alleged that the defendants “conspired” with each other to foreclose the plaintiff from competing in the market for scientific pathology equipment, but did not allege any facts supporting the conspiracy claim. See id. at 56. The defendants moved for dismissal, arguing that simply alleging a “conspiracy” could not establish a viable claim under the antitrust laws. See id.

The district court granted the defendants' motion to dismiss, holding that the use of a term of art such as "conspire," by itself, could not establish that the plaintiff had an actionable claim for conspiracy in restraint of trade. The First Circuit affirmed:

[T]erms like "conspiracy," or even "agreement," are border-line: they might well be sufficient [to avoid Rule 12(b)(6) dismissal] in conjunction with a more specific allegation -- for example, identifying a written agreement or even a basis for inferring a tacit agreement -- but a court is not required to accept such terms as sufficient basis for a complaint. The case law on this point is ample.

Id. (citations omitted).

DM Research noted that although an unsubstantiated conclusory allegation might sometimes turn out to be true, the discovery process is unavailable where a plaintiff has little more at the complaint stage than unlikely speculation. "While this may mean that a civil plaintiff must do more detective work in advance [of filing his complaint], the reason is to protect society from the costs of highly unpromising litigation." Id.

This obligation to allege factual predicates in support of conclusory terms of art applies to a claim which requires a showing that the defendant had "control" over an instrumentality that allegedly caused the plaintiff's injury. Thus, in Canney v. City of Chelsea, 925 F. Supp. 58 (D. Mass. 1996), the court dismissed a complaint in which the plaintiff sought to hold a city liable for the acts of a municipal receiver, finding that "no evidence proffered either in [the] complaint or in pleadings submitted by any of the parties [indicated] that [the receiver] and his employees acted either specifically on [the city's] behalf or at the behest of [the city's elected officials]." Id. at 64. The court granted the city's Rule 12(b)(6) motion because the complaint consisted merely of unsupported allegations of the city's relationship to (and control over) the receiver. See id. at 64-66.

In sum, while this Court must accept as true all of Plaintiffs' well-pleaded facts, it need not accept "[b]ald assertions, subjective characterizations, and legal conclusions" masquerading as facts. DM Research, 2 F. Supp. 2d at 228. It is under this standard that the sufficiency of the theories of liability advanced by the Plaintiffs must be assessed, and it is under this standard that Plaintiffs' claims against the Clear Channel Defendants should be dismissed.

A. Speech-Related Activities That Do Not Incite Immediate Harmful Conduct Are Constitutionally Protected, And Therefore Are Not Actionable.

Paragraph 397 of the Amended Master Complaint lists the acts that allegedly link the Clear Channel Defendants to the Great White concert, and supposedly provide the basis for their liability. Among the acts listed are "advertising [their] promotion and sponsorship [of the concert] in print and on the radio" and "meeting with others who were promoting the concert . . . [to coordinate] the timing of these promotional activities"⁸ Also cited is the supposed display of a banner inviting the public to "party with WHJY," as well as Michael Gonsalves' introduction of Great White.⁹ Liability for these types of speech-related activity, however, is proscribed by the First Amendment to the United States Constitution.

The Supreme Court of Rhode Island confronted a media defendant's alleged liability for broadcast activity in DeFilippo v. National Broadcasting Co., 446 A.2d 1036 (R.I. 1982). There, the parents of a deceased minor sued NBC after their son apparently hanged himself while imitating a stunt he watched on NBC's broadcast of "The Tonight Show." The

⁸ Amended Master Complaint, ¶¶ 397(a), (e).

⁹ See id. ¶¶ 396(b), (d).

plaintiffs suggested that NBC knew of the dangers posed by this program, but nonetheless broadcast it without any warnings. See id. at 1038.

The Superior Court granted summary judgment for NBC, holding that the First Amendment barred the plaintiffs' claim. The Supreme Court affirmed, stating that "[o]f the four classes of speech which may legitimately be proscribed, it is obvious that the only one under which plaintiffs can maintain this action is incitement to immediate harmful conduct under Brandenburg v. Ohio, 395 U.S. 444 (1969). . . ." Id. at 1040.¹⁰ The Court held that there was no basis for finding that the broadcast in any way incited harmful conduct. See id.

DeFilippo relied on Olivia N. v. National Broadcasting Co., 178 Cal. Rptr. 888 (Ct. App. 1981), an action against NBC for injuries inflicted by several juveniles who sexually assaulted the plaintiff with a bottle after watching a movie broadcast by NBC that depicted such an act. The plaintiff asserted that NBC knew or should have known that susceptible viewers might imitate the assault. See id. at 891. The trial court entered a nonsuit; upon the plaintiff's appeal, the court of appeals affirmed, holding that the imposition of liability for airing the movie would impinge on constitutionally protected freedom of speech. See id. at 890-91, 894.

DeFilippo also relied on Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199 (S.D. Fla. 1979), an action alleging that television violence caused the minor plaintiff to kill an elderly woman. The Zamora court granted a motion to dismiss, holding that the right of the public to have broad access to television programming and the right of a broadcaster to disseminate such programming could not be inhibited by those members of the public who are

¹⁰ The other three classes of speech that may be proscribed -- none of which are present here -- are obscenity, fighting words, and "defamatory invasions of privacy." DeFilippo, 446 A.2d at 1039.

particularly sensitive or insensitive. See id. at 205-06. Other courts similarly have held that the First Amendment precludes this type of “media harm” or “broadcast activity” liability, which is analogous to that which Plaintiffs ostensibly seek to impose on the Clear Channel Defendants.¹¹

The Amended Master Complaint does not (and cannot) allege that the Clear Channel Defendants incited anyone to engage in immediate unlawful or harmful conduct. See DeFilippo, 446 A.2d at 1038. Absent such allegations, the First Amendment does not permit Plaintiffs to impose liability on the Clear Channel Defendants for speech-related activities. As such, Plaintiffs’ claims regarding the Clear Channel Defendants’ speech-related activities should be dismissed.

B. Absent A Legal Duty, No Negligence Action Will Lie.

Plaintiffs seek to assign responsibility to the Clear Channel Defendants through claims sounding in negligence. Under Rhode Island law, “[a]nalysis of a negligence claim by a court must begin with the identification of a legal duty owed by the defendant to the plaintiff to avoid committing negligent acts which might harm the plaintiff in a tangible way.” Liu v.

¹¹ See, e.g., Davidson v. Time Warner, Inc., No. Civ.A.V-94-006, 1997 WL 405907, at *16 (S.D. Tex. Mar. 31, 1997) (singer’s lyrics about violence against police officers did not imminently incite violence under Brandenburg); McCollum v. Columbia Broadcasting System, 249 Cal. Rptr. 187, 194-95 (Ct. App. 1988) (dismissing action against artist and record company seeking liability for the suicide of a listener; musical lyrics did not contain requisite call to action sufficient to strip them of First Amendment protections); Bill v. Superior Court, 187 Cal. Rptr. 625, 628-29 (Ct. App. 1982) (imposing liability against film makers on the theory that a violent film attracted violence-prone persons to the vicinity of the theater would have a chilling effect on selection of subject matter for movies, in direct violation of First Amendment); Walt Disney Prods., Inc. v. Shannon, 276 S.E.2d 580, 583 (Ga. 1981) (First Amendment barred tort action against broadcaster of children’s television program for injuries sustained when a child attempted to reproduce sound effects demonstrated on the program by rotating a BB inside an inflated balloon); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067, 1071 (Mass. 1989) (producer could not be civilly liable for exercising free speech rights through production of movie, where movie did not advocate violence and did not constitute incitement).

Striuli, 36 F. Supp. 2d 452, 466 (D.R.I. 1999) (Lagueux, C.J.). “If there is no duty owed the plaintiff, there is no liability for harm caused.” Id. (citing Swajian v. General Motors Corp., 559 A.2d 1041, 1046 (R.I. 1989)). If no duty exists, there is nothing for a trier of fact to consider, and judgment as a matter of law is appropriate. See Ferreira v. Strack, 652 A.2d 965, 970 (R.I. 1995).¹²

The Supreme Court of Rhode Island recently reiterated that the issue of whether a legal duty exists “is purely a question of law, and the court alone is required to make this determination.” Carroll v. Yeaw, 850 A.2d 90, 93 (R.I. 2004) (quoting Kuzniar v. Keach, 709 A.2d 1050, 1055 (R.I. 1998)). In Carroll, the Supreme Court identified five factors that typically are considered in determining whether such a duty exists:

“[A]mong the factors considered are (1) the foreseeability of the harm to plaintiff, (2) the degree of certainty that plaintiff suffered an injury, (3) the closeness of [the] connection between the defendant’s conduct and the injury suffered, (4) the policy of preventing future harm, and (5) the extent of the burden to the defendant and the consequences to the community for imposing a duty to exercise care with the resulting liability for breach.”

Carroll, 850 A.2d at 93 (quoting Banks v. Bowen’s Landing Corp., 522 A.2d 1222, 1225 (R.I. 1987)).

As shown below, “closeness of [the] connection between the defendant’s conduct and the injury suffered” can be established in “sponsorship liability” cases only by alleging and proving control over the cause of the plaintiff’s injury. Instead of alleging that the Clear Channel

¹² The Supreme Court of Rhode Island has been loathe to create novel concepts of duty in tort. See generally Bandoni v. State, 715 A.2d 580, 584 (R.I. 1998) (refusing to recognize novel duty of state to notify crime victims of their rights pursuant to state constitution); Ferreira, 652 A.2d at 970 (refusing to recognize novel duty of social host to protect third parties from acts of those who obtained alcohol at host’s home); Ferreira v. Strack, 636 A.2d 682, 688-89 (R.I. 1994) (refusing to recognize novel duty of landowner to protect his guests from dangers on the abutting public road and drivers who used that road).

Defendants controlled The Station and/or Great White's performance, the Plaintiffs' pleadings speak generally of things the Clear Channel Defendants supposedly "allowed"¹³ or "failed to" do,¹⁴ as if such concepts, when combined with sponsorship, created some legal duty relevant to the tragedy at issue. In reality, however, such "[c]onclusory allegations," standing alone, "are a danger sign that the plaintiff is engaged in a fishing expedition." DM Research, 170 F.3d at 55.

From a precedential standpoint, moreover, these particular shoals have been well-fished. Numerous courts around the country have considered the legal implications of various levels of involvement by sponsors in public events. While individual outcomes have turned on the circumstances of each case, a central tenet of law shines through them all: *one who sponsors, presents, promotes, markets, advertises or otherwise becomes involved in a public event cannot be held liable for injuries sustained in connection with that event in the absence of control -- either legal or actual -- over instrumentalities that caused the injuries.*

Because Plaintiffs' negligence theories (including their sponsorship liability claims) do not meet the standards required to allege a legal duty on the part of the Clear Channel Defendants, Plaintiffs' allegations should be dismissed.

1. Sponsorship, Without Control, Does Not Give Rise To A Legal Duty Or To Tort Liability.

The Plaintiffs' allegations against the Clear Channel Defendants emphasize that the Clear Channel Defendants were "sponsors" or "promoters" of the Great White concert. Notably absent from those allegations, however, is any factual predicate for the one factor that

¹³ Henault Notice of Adoption, ¶¶ 70(d), (i)-(j).

¹⁴ Id. ¶¶ 70(a), (c), (e)-(h), (n).

courts require as a prerequisite for “sponsorship liability”: *control of or authority over instrumentalities that caused the plaintiff’s injury*. This glaring omission precludes a finding that the Clear Channel Defendants owed a legal duty to the Plaintiffs, and therefore is fatal to Plaintiffs’ claims of sponsorship liability as a matter of law.

a. The *Vogel* Decision And Its Progeny Predicate Alleged “Sponsorship Liability” On “Control.”

The leading decision in the “sponsorship liability” area is Vogel v. West Mountain Corp., 470 N.Y.S.2d 475 (App. Div. 1983). There, a beer company and its local distributor sponsored a ski competition by donating racing bibs and banners with the company’s logo to the slope operator who conducted the event. During the competition, the plaintiff was injured when she struck the concrete base of a ski tower. In the ensuing lawsuit, she asserted that the beer company negligently failed to properly arrange the ski course and to warn of the dangers of slalom skiing. The trial court granted summary judgment for the beer company, ruling that, “absent control over the design of the course, the supervision of the race, or the qualifications of the entrants,” liability could not be imposed upon the sponsor. Id. at 476.

In affirming, the Appellate Division noted that the plaintiff sought to create a novel theory of liability for event sponsors who lack control over an event, which would require sponsors to control the conduct of the third parties who actually control the event. See id. at 478. The court found that no special relationship existed between the plaintiff, the defendant sponsor and the slope operator which could justify requiring the sponsor to control the slope operator’s conduct. See id. Commenting on the impracticality of imposing this type of liability on event sponsors, the court said: “While it cannot seriously be disputed that a sponsor benefits by the promotion of its product, financial gain does not of itself give rise to a legal obligation.” Id.

Vogel's "sponsorship liability" analysis -- control over a cause of injury being a prerequisite to duty, which in turn is a prerequisite to liability -- has been cited and followed by courts throughout the country. See, e.g., Previs v. Spano, No. CV-950327537S, 1998 WL 142460, at *2 (Conn. Ct. App. March 20, 1998) ("Sponsorship of an event, without the right to possession and/or control, does not subject the sponsor to liability for action of third parties."); Gragg v. Wichita State Univ., 934 P.2d 121, 132 (Kan. 1997) ("[N]o liability exists simply because one is a sponsor of a public event, absent some proof the sponsor had direct control over hazardous conditions."). Vogel's extensive progeny attests to its solid analytical foundation. ¹⁵

b. Other Courts Independently Have Recognized That "Control" Is Determinative Of "Sponsorship Liability."

Many other courts, facing similar factual circumstances, have reached the same result as Vogel without expressly relying on that decision. For example, in Landvik v. Herbert, 936 P.2d 697 (Idaho Ct. App. 1997), an alleged sponsor of a concert was found to owe no legal duty to a concertgoer who was injured when she dove from the stage during the concert. The alleged sponsor allowed advertisements of the concert to be posted at his bike shop, and allowed

¹⁵ See, e.g., Gehling v. St. George's Univ. Sch. of Med., Ltd., 705 F. Supp. 761, 766 (E.D.N.Y. 1989) (sponsor did not have "sufficient control" over a race as "to be in a position to prevent negligence," and thus could not be held liable for runner's death); Mercer v. City of New York, 679 N.Y.S.2d 694, 695 (App. Div. 1998) (police athletic league did not control coaching, training, supervision or organization of youth baseball league, and thus bore no responsibility for injuries suffered by player during practice); Megna v. Newsday, Inc., 666 N.Y.S.2d 718, 719 (App. Div. 1997) (newspaper sponsor of race was not liable for runner's injuries where newspaper was not involved in design, layout, maintenance or control of race course); Mongello v. Davos Ski Resort, 638 N.Y.S.2d 166, 167 (App. Div. 1996) (event sponsor that did not control or maintain operation of ski slopes owed no duty to skier who was killed while skiing at event); McGrath v. United Hosp., 562 N.Y.S.2d 193, 194 (App. Div. 1990) (hospital that held fundraiser at amusement park, but did not control conditions at park, owed no legal duty toward event attendee who was injured on ride); Gibbons v. County Legislature, Oswego Cty., 556 N.Y.S.2d 428, 429 (App. Div. 1990) (fishing derby sponsor had no control or supervision over event and thus owed no legal duty to participant who drowned at event).

his employees (the organizers of the concert) to sell concert tickets at the shop. See id. at 699-700. The court found that the alleged sponsor had no involvement in the production of the concert itself, however, and concluded that it would be improper to impose upon the alleged sponsor a legal duty to prevent harm to concertgoers merely because his shop advertised the concert and because he permitted ticket sales at the shop. See id. at 701.¹⁶

The only reported Rhode Island case to address the issue of a “sponsor’s” liability predated Vogel by sixty-seven years, but used a strikingly similar analysis. In Sroka v. Halliday, 97 A. 965 (R.I. 1916), the Supreme Court of Rhode Island considered an action by a boy injured after a fireworks display that had been organized by a committee appointed by the City of Pawtucket. The city council had vested the committee with the “full power to act” to organize

¹⁶ See also, e.g., Zarrelli v. Barnum Festival Soc’y, Inc., 505 A.2d 25, 29 (Conn. Ct. App. 1986) (parade sponsor’s financial contribution, absent control or management of event, did not support liability against sponsor for injuries that occurred during parade); Hebert v. St. Paul Fire & Marine Ins. Cos., 757 So.2d 814, 816-17 (La. Ct. App. 2000) (sponsor of race on public road not liable for plaintiff’s injury, caused by disrepair of road course, where sponsor lacked “care, custody and control” of road); Lambert v. Pepsico, Inc., 698 So.2d 1031, 1032 (La. Ct. App. 1997) (“sponsor” or “promoter” of carnival not liable for injuries caused by carnival ride where “sponsor” or “promoter” had no control over rides); Lopresti v. City of Malden, No. CA9801459, 2001 WL 716902, at *2 (Mass. Ct. App. April 26, 2001) (financial sponsor of blood screening event that had no control over testing procedures owed no legal duty to participant who had blood drawn by a used needle); Fjerstad v. Heartland Racing Ass’n, Inc., 563 N.W.2d 87, 89 (Minn. Ct. App. 1997) (bar that sponsored portions of snowmobile racing event not liable for injuries to plaintiff who crashed on race course six days after event, because bar had no control over race course conditions); Esfahani v. Five Star Prods., Inc., No. A-97-1246, 1999 WL 273996, at *6 (Neb. Ct. App. May 4, 1999) (producer of stage show not liable for plaintiff’s injuries caused by fall into uncovered hole in stage, where producer lacked control over conditions in theater); Smith v. West Rochelle Travel Agency, Inc., 656 N.Y.S.2d 340, 341-42 (App. Div. 1997) (tour organizer not liable for independent contractor’s negligence in providing alcohol to minor, where tour organizer had no contractual or legal authority to control independent contractor’s acts); Ricard v. Roseland Amusement & Dev. Corp., 626 N.Y.S.2d 186, 187 (App. Div. 1995) (“no valid line of reasoning” supported argument that dance club event promoter owed duty of care to patron who was injured at dance club event).

the fireworks. The committee, in turn, hired a vendor to furnish and ignite the fireworks at the times and places specified by the committee. See id. at 967.

During the display, some of the fireworks fell to the ground without exploding. A few days later, a young boy found one of the unexploded incendiaries and tried to light it. The incendiary exploded in his hand and caused him severe injuries. See id. at 966. He sued the committee for its negligent conduct of the fireworks display.

The Supreme Court held that the contract between the committee and the fireworks vendor required the vendor to perform all of its acts “in a manner satisfactory to [the committee].” Id. at 970. It therefore found that the committee and its members retained full authority to control the “manner” of all things relating to the fireworks displays, including safety measures to prevent injuries like those suffered by the plaintiff. See id. From this comprehensive control flowed a legal duty: “[T]he defendants in this case had the right to control this display if they saw fit, and it was their duty to see that proper precautions were taken.” Id. at 972.¹⁷

**c. A Finding Of Control Is Needed To Satisfy The
“Closeness Of Connection” Requirement For
Imposing A Legal Duty Under Rhode Island Law.**

The Supreme Court’s recent decision in Carroll v. Yeaw, 850 A.2d 90 (R.I. 2004) demonstrates that Rhode Island law requires “closeness of connection between the defendant’s

¹⁷ Other courts also have held that event sponsors who controlled an event owed a legal duty to attendees. See Weirum v. RKO Gen., Inc., 539 P.2d 36, 39-41 (Cal. 1975) (radio station that conducted and controlled a “find the DJ” contest held liable for the death of a driver killed in a collision with two listeners who were chasing the DJ as part of the contest); Baker v. Mid Maine Med. Ctr., 499 A.2d 464, 467-68 (Me. 1985) (medical center that “retained concomitant control” over golf exhibition at golf club had “non-delegable responsibility” to ensure safety of attendee who was injured by errant shot).

conduct and the injury suffered” for a legal duty to be imposed. Id. at 93. In Carroll, the plaintiff fell down a town-owned stairway that had been repaired defectively by a private citizen, whose application for a permit to perform the repairs was signed by the defendant, a registered contractor. The contractor had no involvement with the repair work, other than allowing the use of his name on the application. The citizen was issued a permit even though, as it turned out, the repairs did not require one. See id. at 91-93.

While acknowledging that the hazard created by the citizen’s repair work (facilitated by use of the contractor’s name on his permit application) was “arguably . . . foreseeable,” the Supreme Court nevertheless held that the contractor did not owe the plaintiff a legal duty. The Court found that “[s]everal factors disrupt[ed] the closeness of the connection between defendant’s conduct in allowing his name . . . to be listed on the permit application and [the plaintiff’s] injury[,]” including the facts that the work did not require a permit, that the private citizen alone performed the repairs, and that the town’s building inspector failed to notice any defects when he determined that the stairway complied with the building code. Id.

Carroll’s discussion of the causal link -- the “closeness of connection” -- between the contractor’s actions and the plaintiff’s injuries is substantively identical to the analyses set forth in the sponsorship liability cases like Vogel and its progeny. In both contexts, the inquiry is whether there was some causal connection between something the defendant did or could control and the harm the plaintiff suffered. The absence of such a link (or in Carroll’s rubric, no “closeness of connection”) precludes a finding of any duty. Indeed, in Carroll this factor was weighted so heavily that the Court found no legal duty existed, even though the other factors it considered pointed toward a finding of duty. See id. at 93-94.

In McAleer v. Smith, 860 F.Supp. 924 (D.R.I. 1994) (Lagueux, C.J.), this Court analyzed a sponsor's control of the injury-causing aspects of an event before finding a legal duty. There, plaintiffs' decedents were killed during a "tall ships" race when the vessel on which they were serving as trainees sank during a sudden storm. The race had been organized and sponsored by defendant American Sail Training Association ("ASTA"), which had solicited the trainees and assigned them to the vessel on which served and, ultimately, died. See id. at 926-29.

In holding that ASTA had a legal duty to place trainees aboard "seaworthy, properly manned and safe vessels," and to "exercise reasonable care in the conduct" of the race, this Court focused on ASTA's involvement in, and control over, numerous critical aspects of the competition:

In addition to being a placement agency for said trainees, . . . ASTA also provided instruction through counsellors and, in this case, actively promoted the vessels and the Tall Ships Race in which they participated. In fact, ASTA co-sponsored the race along with the United Kingdom's STA, collecting and soliciting funds to support its efforts as a sponsor. ASTA also served along with STA on the Race Committee, and the race was conducted pursuant to the "Racing and Sailing Rules" of STA and ASTA. Finally, pursuant to Racing and Sailing Rule 70.(3), ASTA reserved the right to inspect safety conditions aboard the vessels and, indeed, inspected the MARQUES' safety equipment prior to the race.

Id. at 931.

Notably, ASTA's intimate and comprehensive involvement with the race gave rise to only a narrow legal duty to place sail trainees on seaworthy vessels and to conduct a reasonably safe race. See id. at 931, 937-38 (ruling that ASTA had no responsibility for the factors that caused the trainees' deaths, which factors were not within ASTA's control). This result is consistent with the rule that a legal duty must be defined through primary reference to the "closeness of connection" between matters a defendant controls and the plaintiff's injury.

d. Plaintiffs' Allegations Do Not Establish That The Clear Channel Defendants Had Control Over Anything That Could Justify The Imposition Of A Legal Duty.

Plaintiffs' allegations of the Clear Channel Defendants' connection to the Great White concert sharply diverge from ASTA's intimate involvement in the tall ships race -- but strikingly resemble the cases cited above in which sponsors owed no legal duty to injured event attendees. Plaintiffs do not (and cannot) allege any facts supporting a conclusion that the Clear Channel Defendants had or retained a right to control anything that could have caused the tragedy of February 20, 2003 -- not the nightclub, not the band, not the number of tickets issued, not the number of patrons admitted, not the soundproofing of the premises, not the pyrotechnics, not the licensing of the pyrotechnician, not the adequacy of emergency exits, and not the adequacy of inspections of the nightclub. In short, Plaintiffs' allegations fall short of even the limited duty found in McAleer, which itself did not extend to anything over which the defendant sponsor exercised less than complete, comprehensive control.

Plaintiffs feint in the direction of alleging "control" in Paragraph 398 of the Amended Master Complaint, in which they state that WHJY, "by its employee and agent Mike Gonsalves, had both the authority and opportunity to stop or delay Great White's performance over any issue relating to safety or equipment." The only fact offered to support this conclusion is in Paragraph 397(d), which states that Gonsalves was the "master of ceremonies [who was] to introduce the band" It is clear, however, that providing on-air personalities for appearances at promotional events does not establish a broadcaster's control over such events. See O'Sullivan v. Hemisphere Broadcasting Corp., 520 N.E.2d 1301, 1302-03 (Mass. 1988) (presence of radio station's disc jockey at bar's promotional event did not establish that station had control of alcohol service at event); Triplex Comms., Inc. v. Riley, 900 S.W.2d 716, 719

(Tex. 1995) (presence of radio station's disc jockey and mascot at bar's "Ladies' Night" promotion did not establish that station had or exercised any right of control over event). There is no precedent for the novel theory of "master of ceremonies" liability as alleged here.

Nothing else in the Amended Master Complaint or the Henault Notice of Adoption even suggests that the Clear Channel Defendants controlled the band's performance, the pyrotechnics or any other factor that caused The Station fire. Lacking such factual predicates, nothing in these pleadings alleges the control required to establish the "close connection" between the Clear Channel Defendants' alleged acts and the Plaintiffs' injuries that is needed to impose a legal duty.

2. WHJY's Supposed "Knowledge" Of Conditions Regarding The Great White Concert Did Not Give Rise To A Legal Duty.

Plaintiffs refer in the Amended Master Complaint to what the Clear Channel Defendants allegedly knew or should have known about Great White's past performances.¹⁸ They allege that the Clear Channel Defendants were "sufficiently familiar" with the band to "be aware of the style and manner of its musical performance and stage production."¹⁹ Plaintiffs also allege that their "superior knowledge" imposed a legal duty upon the Clear Channel Defendants.²⁰ These assertions are simply wrong.

As discussed above, the question of whether a legal duty exists under Rhode Island law calls for a multi-factor analysis that focuses on a number of aspects of the defendant's alleged connection to the plaintiff's injury. The defendant's alleged "knowledge" of conditions

¹⁸ See Amended Master Complaint, ¶¶ 396, 399.

¹⁹ See id. ¶ 396.

²⁰ See id. ¶ 401.

relating to the plaintiff's injury is not an element of this analysis. See Carroll, 850 A.2d at 93.

To the extent Plaintiffs' allegations of "knowledge" are merely another way to say that their injuries (and the events causing them) were or should have been foreseeable to the Clear Channel Defendants, Rhode Island law is clear that "foreseeability of injury does not, in and of itself, give rise to a duty." Ferreira, 636 A.2d at 688 n.4 (citing D'Ambra v. United States, 338 A.2d 524, 528 (R.I. 1975)); see also Carroll, 850 A.2d at 93-94.

Foreseeability, of course, is a "linchpin" in any negligence case, in the sense that it is a threshold inquiry to every negligence claim. See, e.g., W. Page Keeton *et al.*, Prosser & Keeton on the Law of Torts, § 43 (5th ed. 1984) ("Negligence . . . necessarily involves a foreseeable risk, a threatened danger of injury, and conduct unreasonable in proportion to the damage."). Moreover, foreseeability arguably is present in virtually every "sponsorship liability" case. In Vogel, for example, the sponsor arguably could have foreseen that a ski race participant might collide with one of the ski lift towers. See Vogel, 470 N.Y.S.2d at 478. Yet the Vogel court, like many others, refused to impose a legal duty on the basis of foreseeability alone.²¹

Instead, courts have recognized that foreseeability is not a substitute for a direct connection between a causative factor controlled by the sponsor and the plaintiff's injury. As

²¹ For other decisions where injury in a sponsored event was arguably foreseeable, but did not impose a legal duty upon the sponsor, see, e.g., Zarrelli v. Barnum Festival Soc'y, Inc., 505 A.2d 25 (Conn. Ct. App. 1986) (woman crushed under parade float after becoming drunk during parade sponsored by bank); Lambert v. Pepsico, Inc., 698 So.2d 1031 (La. Ct. App. 1987) (riders of carnival ride injured by ride malfunction during carnival sponsored by soft drink company); Mercer v. City of New York, 679 N.Y.S.2d 694 (App. Div. 1998) (little league baseball player hurt after being struck in the eye with a baseball during practice in league sponsored by police organization); Smith v. West Rochelle Travel Agency, Inc., 656 N.Y.S.2d 340 (App. Div. 1997) (student who purchased tour operator's spring break tour package died after becoming intoxicated and jumping off cruise vessel during tour); Gibbons v. County Legislature, Oswego Cty., 556 N.Y.S.2d 428 (App. Div. 1990) (fisherman drowned during fishing derby sponsored by beer company).

demonstrated in Carroll, the “closeness of connection” between the defendant’s conduct and the plaintiff’s injury must be established before imposing a legal duty upon the defendant. The Clear Channel Defendants have no such connection here -- alleged or otherwise. Without such a connection, allegations of foreseeability cannot give rise to a legal duty.

Plaintiffs refer to the Clear Channel Defendants’ alleged “knowledge” as though it were a concept separate from “foreseeability.” Yet, like foreseeability, knowledge has never been considered a sufficient basis on which to impose a legal duty. See, e.g., Wenrick v. Schloeman-Siemag Aktiengesellschaft, 564 A.2d 1244, 1248 (Pa. 1989) (“Anglo-American common law has for centuries accepted the fundamental premise that mere knowledge of a dangerous situation, even by one who has the ability to intervene, is not sufficient to create a duty to act.”). There is simply no legal basis for imposing a duty on the basis of “foreseeability of risk” or “knowledge of conditions,” as the Plaintiffs suggest. See Carroll, 850 A.2d at 94 (declining to impose a legal duty even though danger was “arguably foreseeable”).

3. No “Special Circumstances” Existed That Would Justify The Imposition Of A Legal Duty On The Clear Channel Defendants.

The Plaintiffs suggest that the Clear Channel Defendants bear some legal duty by virtue of supposed “special circumstances,” as well as the Clear Channel Defendants’ “special role in supporting and promoting the concert”²² These allegations focus on the Clear Channel Defendants’ failure to do certain things -- i.e. alleged nonfeasance -- as opposed to any

²² See Amended Master Complaint, ¶¶ 400-01. It is unclear exactly what predicate facts constitute the “special circumstances” or give rise to the “special role” to which Plaintiffs allude. It is evident, however, that the role of concert sponsor constitutes neither a “special role” nor “special circumstances” which could give rise to a legal duty. It is also clear that “knowledge” (or foreseeability) cannot constitute a “special role” or “special circumstances” of the type referred to by the Plaintiffs.

affirmative negligent action. Thus, for example, Plaintiffs allege that the Clear Channel Defendants failed to make a “minimal inquiry” about the dangers of Great White’s performance, and that said failure, rather than any affirmative act, caused the Plaintiffs’ injuries.²³

Liability for *nonfeasance* requires a finding of “some relationship between the parties [i.e. the plaintiff and defendant] of such character that public policy justifies the imposition of a special duty to act on the defendant.” Pietrafesa v. Board of Governors for Higher Ed., 846 F. Supp. 1066, 1074 (D.R.I. 1994). This theory is separate and distinct from that which holds a tortfeasor liable for *misfeasance* that causes an injury. Only a few narrowly defined factual circumstances have been found to give rise to a “special relationship” that would justify liability for nonfeasance, such as the relation between an owner and an occupier of land, the relation between a ship and a seaman who has fallen overboard, and the relation between an employer and an employee who is injured in the course of his employment. See id. (citing W. Page Keeton *et al.*, Prosser & Keeton on the Law of Torts, § 56 (5th ed. 1984)).

Courts that have adjudicated “sponsor liability” cases have focused on the “control” principles cited above, rather than “special relationship” theories. Indeed, in the seminal Vogel case, the Appellate Division of the New York Supreme Court expressly noted the impropriety of the “special relationship” theory in the context of a “sponsor liability” claim:

Plaintiff argues that [the sponsor defendant] was negligent because of its failure to assume control over the event. The duty to control the conduct of others revolves around a special relationship between defendant, the person whose conduct he is required to control, and the person exposed to the harm. . . . *A realistic assessment of the relations between plaintiff, [the event operator] and [the sponsor defendant] does not give rise to any such special relationship, since there was no opportunity on the part of the [sponsor defendant] to control the tortfeasor.* . . . While it cannot

²³ See Amended Master Complaint, ¶¶ 401-02.

seriously be disputed that a sponsor benefits by the promotion of its product, financial gain does not of itself give rise to a legal obligation.

Vogel, 470 N.Y.S.2d at 478 (citation omitted) (emphasis added).

Plaintiffs' allegations do not describe any "special relationship" which could justify the imposition of liability for nonfeasance. The Plaintiffs have pleaded no facts regarding any relationship between themselves and the Clear Channel Defendants. There is thus no basis from which to infer a "special relationship" between the Plaintiffs and the Clear Channel Defendants that could give rise to any legal duty.

4. There Is No Legal Basis To Impose A Duty To "Make Minimal Inquiry" Upon The Clear Channel Defendants.

The Amended Master Complaint alleges that, on the basis of certain "special circumstances," the Clear Channel Defendants "owed a duty as the promoter and sponsor of the [Great White concert] to make minimal inquiry sufficient to discover dangers of the band's performance."²⁴ As noted above, it is at best unclear exactly what "special circumstances" lead to this duty. As a matter of law, however, no such duty existed.

This Court, in an action brought by an injured tourist, considered whether a tour operator owes a "duty to make a minimal inquiry" as to the conditions of tour lodgings. In McElheny v. Trans National Travel, Inc., 165 F. Supp. 2d 190 (D.R.I. 2001) (Lagueux, J.), the plaintiff sustained injuries after falling through a chair at a hotel where the tourist was staying, as part of a travel package arranged by the defendant tour operator. This Court dismissed the tourist's complaint, finding that the tour operator owed no legal duty to protect the tourist from

²⁴ See Amended Master Complaint, ¶ 400.

injuries caused by defective conditions at the hotel, since the tour operator had no control over the hotel's conditions. See id. at 197-98.

This Court did suggest, however, that the tour operator might be obliged to conduct "a minimal investigation of the hotel accommodations included in its tour packages." Id. at 203 (citing Wilson v. American Trans Air, Inc., 874 F.2d 386, 390 (7th Cir. 1989)). As explained in Wilson, that duty would arise from the nature of the relationship between the tourist and the tour operator -- specifically, from the tour operator's status "as the principal responsible to tour participants for all the services and accommodations offered in connection with the charter tour" Wilson, 874 F.2d at 389. In the context of that relationship, a tourist seeks out a tour operator to arrange for the tourist's travel and accommodations. The tour operator therefore "cannot disclaim liability for injuries arising out of *its own* negligence," i.e. its negligent selection of a venue to which it has agreed to send the tourist. Id. (emphasis added).

The Amended Master Complaint alleges no relationship like that between the tour operator and the tourist in McElheny or Wilson. Although Paragraph 397 lists a number of things the Clear Channel Defendants allegedly did in relation to the Great White concert -- including running print and radio advertisements, authorizing a banner announcing the concert, distributing free tickets, and providing a "master of ceremonies" and various interns to "assist" with "promotion and sponsorship" -- none of these actions made the Clear Channel Defendants "the principal responsible" to Plaintiffs "for all the services and accommodations offered" in connection with the Great White concert. Cf. Wilson, 874 F.2d at 389.

On the contrary, each of these actions is a common or customary aspect of commercial sponsorship. Even more importantly, none of these acts had any causal relationship

to Plaintiffs' injuries. The Plaintiffs' claims based on the "duty to make minimal inquiry" theory thus should be dismissed.

5. Public Policy, Which Is Integral To The Duty Analysis, Disfavors Imposition Of Liability In These Circumstances.

Under Rhode Island law, considerations of public policy are part and parcel of the legal duty analysis. See, e.g., Banks v. Bowen's Landing Corp., 522 A.2d 1222, 1225-26 (R.I. 1987) (refusing to impose legal duty on waterfront business owners to warn against diving into shallow waters, as imposition of duty would do little to stop persons from diving into water, but would be extremely burdensome to business owners). In the instant case, not only do public policy considerations militate against imposing a legal duty on the Clear Channel Defendants, they support the opposite result.

As the Vogel court stated, imposing a legal duty on a sponsor who lacks control over an event "would prove an undue expansion of the sponsorship relationship, the net result of which would be to discourage further participation." Vogel, 470 N.Y.S.2d at 487. Other courts have reached similar conclusions in this context. See, e.g., McGrath v. United Hosp., 562 N.Y.S.2d 193, 194 (App. Div. 1990) (imposing duty on hospital to control rides at amusement park at which hospital sponsored event would be "unreasonable" given hospital's lack of expertise to operate rides); cf. Lopresti v. City of Malden, No. CA9801459, 2001 WL 716902, at *2 (Mass. Super. Ct. April 26, 2001) (imposing a legal duty on a charitable event sponsor would "have a chilling effect on the willingness of individuals and businesses to provide such [sponsorship]. . . . [S]ound social policy would not be advanced by a rule that discouraged charitable giving").

Of particular importance in this case is the probability that imposing liability on the Clear Channel Defendants would have a chilling effect on future broadcast activities. These activities consist of speech and other communications that are protected by the First Amendment. See pp. 9-11, supra. Imposing liability for broadcast activity “invariably lead[s] to self-censorship, which is inconsistent with the right to free speech.” DeFilippo v. National Broadcasting Co., 446 A.2d 1036, 1041 (R.I. 1982). Thus, the public policy in favor of the Clear Channel Defendants’ right to unfettered speech lends additional support to the conclusion that no legal duty should be imposed on them under these circumstances.

Moreover, the duties that Plaintiffs would impose on broadcasters through the instant case would profoundly impact the manner in which the broadcasting industry conducts business. The duties Plaintiffs advocate here would require broadcasters to inspect and certify the safety of each and every venue that is hosting an event for which the broadcaster airs commercials, advertisements or sponsorships. The cost of such a duty to broadcasters would be prohibitive. Even if that cost could be passed onto those paying for such advertisements, that exercise is wholly unnecessary, because the responsibility for patrons’ safety does and should reside with the entity that controls the venue -- be it the owner or lessor of the venue, or the entity or individual who controls the instrumentalities within the venue that caused the plaintiff’s injury.

Although the circumstances involved here are tragic, even they do not justify a profound shifting of the burden of safety from those who control the venue to broadcasters exercising First Amendment rights. Public policy does not countenance such a result.

C. **“Naked Licensing” Is Not A Basis For Tort Liability Against The Clear Channel Defendants.**

Plaintiffs next turn to intellectual property law as a basis for their claims.

Paragraph 400 of the Amended Master Complaint alleges that the Clear Channel Defendants’ “allowing use of the trademark or servicemark, ‘WHJY[,]’ without making such minimal inquiry into the quality or safety of the product or services associated with it constituted *naked licensing* of the mark which deceived, or tended to deceive, the public, including Plaintiffs” (emphasis added). The implication that alleged “naked licensing” of the WHJY mark could lead to tort liability for the Clear Channel Defendants is specious.

“Naked licensing” is a defense to actions for trademark infringement. The concept provides that the owner of a mark is estopped from challenging a licensee’s use of the owner’s mark, where the owner has failed to exercise control and supervision of the mark for a significant period of time. See, e.g., Miller v. Glenn Miller Prods., 318 F. Supp. 2d 923, 945 & n.12 (C.D. Cal. 2004); In re Blackstone Potato Chip Co., 109 B.R. 557, 561 (Bankr. D.R.I. 1990). This intellectual property law concept has no applicability in a tort case.

Plaintiffs’ use of the “naked licensing” theory is a classic attempt at “litigation by hunch,” in the absence of a truly viable claim, in order to subject the Clear Channel Defendants to an unrestrained fishing expedition in discovery. See Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 (1st Cir. 1988). “Naked licensing” is not an actionable tort theory which can survive a Rule 12(b)(6) motion. Especially given Rhode Island’s recognized distaste for creating novel causes of action and theories of tort liability (see, e.g., note 12, supra), the Plaintiffs’ “naked licensing” claims should be dismissed.

D. Absent Equal Control, There Can Be No “Joint Venture.”

The Henault Plaintiffs also allege that the Clear Channel Defendants were part of a vaguely defined “joint venture” that collectively is responsible for the fire.²⁵ As this Court has stated:

Under Rhode Island law, a joint venture is an association of two or more persons formed to carry out a single business enterprise for profit. Fireman’s Fund Ins. Co. v. E.W. Burman, Inc., 120 R.I. 841, 844, 391 A.2d 99, 101 (1978). Generally, in order for a joint venture to exist, the parties must be bound by express or implied contract providing for: (1) a community of interests, and (2) joint or mutual control, that is, an equal right to direct and govern the undertaking. In addition, the joint venture agreement must provide for a sharing of losses as well as profits.

McAleer, 860 F. Supp. at 943.; see also McAleer v. Smith, 57 F.3d 109, 114-15 (1st Cir. 1995) (finding that a key element in determining the existence of a “joint venture” is whether the alleged “joint venturers” each had control over instrumentalities of the purported joint venture).

This Court’s focus in McAleer is instructive. The McAleer plaintiffs alleged that a joint venture existed between the ASTA and the owners of the sunken vessel, which could impute liability for the operation of the ship to ASTA. This Court rejected that claim, expressly finding that even though ASTA and the ship owners “may have engaged in coordinated promotional activities for their mutual advantage, the record contains no evidence of any agreement to share profits or losses. . . . In addition, *there is no evidence that ASTA had*

²⁵ See Henault Notice of Adoption, ¶¶ 67-71. The other Defendants alleged to be involved in the joint venture include Jeffrey and Michael Derderian, DERCO LLC d/b/a The Station, Manic Music Management, Inc., Jack Russell, Daniel Bichele, Paul Woolnough, Knight Records, Inc., Anheuser-Busch, Inc., Anheuser-Busch Companies, Inc., McLaughlin & Moran, Inc., Citadel Communications Corporation d/b/a WQGN-FM, Town of West Warwick, Motiva Enterprises, LLC, Shell Oil Company, Dennis Larocque, the State of Rhode Island and Irving J. Owens. See id. ¶ 67.

anything near an equal right to direct the operations of [the sunken vessel].” McAleer, 860 F. Supp. at 943 (emphasis added).

Other courts agree that joint and equal control is essential to joint venture claims made against event sponsors. For example, in O’Sullivan v. Hemisphere Broadcasting Corp., 520 N.E.2d 1301 (Mass. 1988), the plaintiff sued a radio station for its alleged negligence in sponsoring an event at a bar, at which an event patron allegedly became drunk and injured the plaintiff while driving away from the event. Under its sponsorship agreement, the radio station donated air time to advertise the event and provided some of its on-air personalities to appear at the event. See id. at 1302. The plaintiff claimed that by sponsoring the event, the radio station became a joint venturer with the bar and therefore had a right and obligation to control the distribution of alcohol at the event. See id.

The trial court granted summary judgment in favor of the radio station. The Supreme Judicial Court of Massachusetts affirmed, holding that the radio station was neither “directly [nor] vicariously authorized to supervise the distribution of beer and hence . . . had [no] right to control its distribution.” Id. at 1303. As a result, the bar’s negligence in serving the intoxicated driver could not be imputed to the radio station as a joint venturer. See id.²⁶

The joint venture theory also was rejected in Archer v. Outboard Marine Corp., 908 S.W.2d 701 (Mo. Ct. App. 1995). In Archer, the plaintiff sued the sponsors of a fishing

²⁶ Similarly, in Triplex Comms., Inc. v. Riley, 900 S.W.2d 716, 718-19 (Tex. 1995), a radio station sponsored an event at a bar (including providing a disc jockey and mascot) at which an underage patron was served alcohol, became drunk, and later crashed his car into two policemen. In refusing to submit the plaintiff’s joint enterprise claim against the radio station to the jury, the trial court noted that no evidence existed that supported a key element of the joint enterprise theory -- an equal right to control the “enterprise.” The Supreme Court of Texas affirmed the trial court’s decision, reiterating the legal insufficiency of the evidence of an equal right of control over the “enterprise.” See id. at 718-19.

tournament at which a participant recklessly drove his boat into the plaintiff's boat, killing and injuring two people. The defendant sponsor displayed its logos on various items at the tournament, and conditioned its sponsorship on the tournament organizers' implementation of certain safety regulations. See id. at 703. The sponsor did not conduct the tournament, however, nor did it supervise or direct the actions of the tournament organizer in running the tournament. See id.

The trial court granted summary judgment for the sponsor, and the court of appeals affirmed, finding that the defendant's sponsorship of the tournament did not make it a joint venturer. "For the [tournament] to have constituted a joint venture, [the sponsor and organizer] would necessarily have had equal voices in directing the meets. They did not. Although [the sponsor] directed the use of its logos and demanded minimal safety requirements, it did not have any voice in the remaining, and more significant, tournament details." Id. (citations omitted).

The same problems that were identified by this Court in McAleer, and were present in the other cases mentioned above, confront the Henault Plaintiffs here. Although the Henault Plaintiffs allege that the Clear Channel Defendants and the other joint venture defendants entered an "express or implied agreement" for the common purpose of conducting the concert for their "common business interests and for economic gain,"²⁷ there is no allegation that these defendants had any agreement to share in the profits or losses from the alleged joint venture.

²⁷ Henault Notice of Adoption, ¶ 68.

Moreover, the Plaintiffs also fail to allege that the “joint venture” Defendants had joint or mutual control -- i.e. an equal right to direct and govern -- the undertaking. Instead, the Henault Plaintiffs assert that each defendant “controlled certain aspects” of the Great White concert.²⁸ In McAleer, this Court found that ASTA controlled certain aspects of the plaintiffs’ decedents’ participation in the sailing race in which they were killed, but had no control over the cause of their deaths -- the operation and condition of the vessel itself. Plaintiffs’ instant allegations do not satisfy the standard set by this Court in McAleer -- a mere allegation of control of “certain” unnamed aspects of the concert does not satisfy the “mutual” or “joint” control element of this theory of liability.

While the Henault Plaintiffs allege several causal factors that led to their injuries, including the improper use of pyrotechnics, the absence or poor condition of sprinklers, fire exits and other fire safety precautions,²⁹ the existence of flammable soundproofing on the walls of the

28 Henault Notice of Adoption, ¶ 69.

29 The Henault Plaintiffs assert that the joint venture defendants, including the Clear Channel Defendants, were negligent due to, *inter alia*, their failure to comply with and/or their violation of sections 23-28.6-13, 23-28.6-15, and 23-28-11.3 of the Rhode Island General Laws. See Henault Notice of Adoption, ¶¶ 70(b)-(e). Both sections 23-28.6-13 (requiring emergency lighting) and 23-28.6-15 (regulating the use of flammable decorative and acoustical materials) regulate conditions at places of assembly; under general tort principles, only persons with possession or control over premises have responsibility for the condition of those premises. See Moseley v. Fitzgerald, 773 A.2d 254, 257 (R.I. 2001). The Plaintiffs fail to allege any facts that establish that the Clear Channel Defendants owned, possessed or controlled The Station at any time.

Section 23-28.11-3 incorporates standards for the “storage, handling, transportation and display” of pyrotechnics, and establishes guidelines for issuing permits for pyrotechnic use. Plaintiffs do not allege that the Clear Channel Defendants stored, handled, transported, displayed, possessed or used any pyrotechnics on the night of the fire.

As such, nothing in the Henault Notice of Adoption -- or in the Amended Master Complaint -- establishes or even supports an inference that any of these statutes apply to or should be used as a standard of conduct for the Clear Channel Defendants. This Court should decline to rely on these statutes to impose liability on the Clear Channel Defendants, especially since nothing in the statutes suggest that the legislature intended

Continued on following page

nightclub, and the sale of alcohol, they fail to allege that any of these items were used to further a “joint purpose” that included the Clear Channel Defendants or that the Clear Channel Defendants had any -- let alone equal -- control over any of these factors. In short, the Henault Plaintiffs’ allegations that the Clear Channel Defendants participated in a joint venture are simply ‘bald assertion[s]’ that cannot withstand a motion to dismiss. See Day v. Fallon Cmty. Health Plan, Inc., 917 F. Supp. 72, 75 (D. Mass. 1996).

III. CONCLUSION

The story presented by Plaintiffs is both tragic and sympathetic. As a matter of law, however, that story is insufficient to assign any responsibility for Plaintiffs’ injuries to the Clear Channel Defendants. At bottom, the claim against the Clear Channel Defendants is that they were present at the scene of the fire and had advertised the concert to the public. Although Plaintiffs adorn this theory with legalistic terms like “sponsorship,” “promotion” and “joint venture,” their allegations are bereft of legal substance, and cannot withstand dismissal under Rule 12(b)(6).

At this juncture, Plaintiffs have had nearly two years to research their causes of action against the various Defendants in these Civil Actions, and several Plaintiffs have filed amended pleadings (some several times). Nevertheless, the allegations in the Amended Master Complaint and the Henault Notice of Adoption provide no further factual predicates for Plaintiffs’ claims than did any of the Plaintiffs’ earlier-filed Complaints in these Civil Actions.

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such a use. See Bandoni v. State, 715 A.2d 580, 585 (R.I. 1998) (court should not impose judicial glosses on or inject remedies into statutes where such were not contemplated by the legislature).

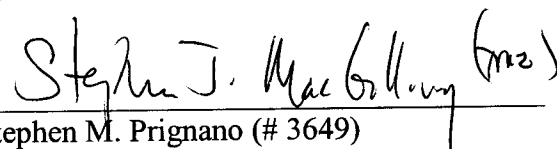
Clearly, Plaintiffs cannot assert any factual allegations, within the strictures of Rule 11 of the Federal Rules of Civil Procedure, which could establish an actionable claim against the Clear Channel Defendants. As such, the Clear Channel Defendants respectfully ask this Court to dismiss all claims asserted against them in these Civil Actions for failure to state a claim upon which relief can be granted.

Dated: February 4, 2005

Respectfully submitted,

The Clear Channel Defendants

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CERTIFICATION

I, the undersigned, hereby certify that on the 4th day of February, 2005, I mailed a copy of the within **OMNIBUS MEMORANDUM OF CAPSTAR RADIO OPERATING COMPANY AND CLEAR CHANNEL BROADCASTING, INC. IN SUPPORT OF THEIR MOTIONS TO DISMISS** by electronic mail, to the following counsel of record:

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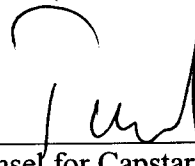
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